

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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WASHINGTON, D.C. 20554

In the Matter of )  
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Southwestern Bell Telephone Company, Pacific Bell, )  
and Nevada Bell Petition for Relief ) CC Docket No. 98-91  
from Regulation Pursuant to Section 706 of the )  
Telecommunications Act of 1996 and )  
47 U.S.C. § 160 for ADSL Infrastructure and Service )

JOINT REPLY COMMENTS OF AT&T CORP. and  
TELEPORT COMMUNICATIONS GROUP INC.

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## TABLE OF CONTENTS

	<u>PAGE</u>
I. INTRODUCTION AND SUMMARY.....	1
II. THE COMMENTS CONFIRM THAT THE COMMISSION LACKS STATUTORY AUTHORITY TO FORBEAR FROM ENFORCING THE UNBUNDLING AND RESALE REQUIREMENTS OF SECTION 251(c), AND THE "PICK AND CHOOSE" PROVISIONS OF SECTION 252(i).....	3
III. THE COMMENTS FURTHER DEMONSTRATE THAT SBC'S THREE PRONG "QUALIFICATION" TEST WOULD MERELY CREATE YET ANOTHER BARRIER TO COMPETITION.....	7
IV. THE COMMENTS CONFIRM THAT THE COMMISSION MUST DENY SBC'S REQUEST FOR NON-DOMINANT TREATMENT UNDER SECTION 10.....	10
V. CONCLUSION.....	16

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**JOINT REPLY COMMENTS OF AT&T CORP. and  
TELEPORT COMMUNICATIONS GROUP INC.**

AT&T Corp. and Teleport Communications Group Inc. ("AT&T/TCG") respectfully submit their Joint Reply Comments regarding the above-referenced petition of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell ("SBC"). The comments demonstrate that SBC's request for relief from regulation in its provision of asymmetrical digital subscriber line ("ADSL") infrastructure and services is beyond the Commission's power to grant, and would affirmatively frustrate the pro-competitive mandates of the Telecommunications Act of 1996 ("the Telecom Act").

**I. INTRODUCTION AND SUMMARY**

The Comments filed in response to the SBC petition by entities other than incumbent local exchange carriers ("ILECs") are consistent in their opposition to the petition. They provide reasoned analyses of the limitations on the Commission's authority to grant the requests; they uniformly urge the Commission not to depart from its statutory mandate to pry open the local markets to competition as the only

reasonable and authorized means to prompt innovation in the local exchange; they consistently demonstrate that the RBOCs must be held to their commitments under the 1996 Act before they are allowed into the interLATA market; and they debunk thoroughly the notion that SBC has fulfilled its clear obligations under the act to make its local network available to potential competitors.

In contrast to the picture of compliance that SBC seeks to paint for itself, the Comments filed by the competitive local exchange carriers ("CLECs") in particular demonstrate conclusively that the ILECs in general, and SBC in particular, have not opened their networks to competitors, and are seeking to evade their statutory obligations of unbundling, collocation, interconnection and resale. Against this weighty record, there can be no basis (even if the Commission had the statutory authority to do so, which it does not) to conclude that relief from the mandatory obligations and competitive safeguards of the 1996 Act can accomplish any public interest goal.<sup>1</sup>

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<sup>1</sup> An agency decision that is inconsistent with the record developed may be deemed arbitrary and capricious. See 5 U.S.C. 706(2)(A). The decision must have "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Competitive Telecomm. Ass'n v. F.C.C., 87 F.3d 522, 529 (D.C. Cir. 1996) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)); see also Bell Atlantic Tel. Cos. v. F.C.C., 79 F.3d 1195, 1202 (D.C. Cir. 1996).

Accordingly, as AT&T/TCG demonstrated in their initial Comments, and as many other parties showed, grant of the relief sought by SBC would serve to extend the reach of SBC's monopoly control to encompass new telecommunications services, to the detriment of the public and the industry. On the basis of the record here, the Commission must deny the petition in its entirety. Any further consideration of issues related to the deployment of advanced telecommunications services should be conducted in the context of a comprehensive and focused factfinding proceeding, such as a Notice of Inquiry, issued pursuant to Section 706(b) of the Telecommunications Act of 1996.

**II. THE COMMENTS CONFIRM THAT THE COMMISSION LACKS STATUTORY AUTHORITY TO FORBEAR FROM ENFORCING THE UNBUNDLING AND RESALE REQUIREMENTS OF SECTION 251(c), AND THE "PICK AND CHOOSE" PROVISIONS OF SECTION 252(i)**

The commenters in this proceeding overwhelmingly confirm that the Commission has no authority to waive the requirements of Section 251(c) of the Communications Act as requested by SBC.<sup>2</sup> The Commission cannot forbear from enforcing the unbundling and resale obligations of Section 251(c), unless and until it can find that SBC has "fully implemented" these obligations.<sup>3</sup> SBC also cannot show that it currently provides network elements in accordance with the requirements of Section 251(c); the

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<sup>2</sup> See e.g., Allegiance Telecom, Inc. ("Allegiance") at 9-10; Hyperion Telecommunications, Inc. ("Hyperion") at 8-9; Sprint Corporation ("Sprint") at 3.

<sup>3</sup> 47 U.S.C. § 160(d); see CompTel at 2-3; MCI at 9-10; Telecommunications Resellers Association ("TRA") at 5-6.

record instead evidences SBC's continuing resistance to providing interconnection, access to UNEs, or resold services on a nondiscriminatory basis.<sup>4</sup>

As a threshold matter, the commenters other than, predictably, the ILEC community, confirm that the plain meaning of Section 251(c) of the Telecom Act extends to those SBC facilities required to provide ADSL. First and foremost, there is no basis to read into the Telecom Act a limitation on its effectiveness to the technologies in place at the time of its passage.<sup>5</sup> This is akin to freezing Section 202 of the Communications Act back in 1934. Moreover, numerous commenters, such as the Coalition Representing Internet Service Providers ("CRISP") explain that, as a factual matter, any effort to distinguish broadband capabilities and ADSL from traditional telecommunications is "a distinction without a difference," as ADSL "relies predominately on the existing infrastructure."<sup>6</sup> In fact, no distinction between ADSL and other telecommunications services can be sustained because SBC's ADSL "is *intrinsically married* to its local service monopoly."<sup>7</sup>

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<sup>4</sup> See Covad at 4-5; ICG Telecom Group, Inc. ("ICG") at 10-20.

<sup>5</sup> See, e.g., GTE at 3-7.

<sup>6</sup> CRISP at 19; see also Hyperion Telecommunications, Inc. ("Hyperion") at 2 ("The SBC LECs, with their monopoly bottleneck facilities, are well aware that they control virtually all of the existing copper loops that are necessary for the provisioning of ADSL services.").

<sup>7</sup> Commercial Internet eXchange Association ("CIX") at 7 (emphasis in original).

Finally, no weight can be attached to the claim of SBC and the ILEC commenters that regulatory relief is necessary because otherwise ILECs will not invest in new technologies. To the contrary, the record in this and the related RBOC 706 proceedings, as well as even a cursory examination of public announcements by ILECs, reveals that SBC and other ILECs are anxious and willing to invest in these technologies notwithstanding the fact that they are currently subject to the full panoply of pro-competitive safeguards of Sections 251, 252 and 271 of the Communications Act.<sup>8</sup>

The Comments also refute completely SBC's claim that Section 251(c) has been "fully implemented," either generally or in its provision of ADSL. The record is replete with examples of SBC's intransigence with respect to its Section 251(c) obligations. For example, Covad provides particularly striking examples of SBC's poor performance, showing that SBC-provisioned DSL loops are "delivered late, do not work, or both, an astonishing 60% of the time."<sup>9</sup> Moreover, SBC has denied Covad DSL collocation based on claims of space limitations in almost one-third of the requested central offices,

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<sup>8</sup> For example, the June 26 edition of "TechWeb News," reported that SBC had stated on June 25th that SBC would spend up to \$600 million over the next three years to transform its data network from switched circuit to internet protocol ("IP"). The publication quoted SBC's executive vice president of corporate planning that SBC's "vision is to provide high-speed access services to both businesses and consumers" using both the public switched telephone network and IP.

<sup>9</sup> Covad at 7; see also id. 4-8.

while filing its own ADSL tariff for twenty of those offices.<sup>10</sup> Additionally, SBC has not provided any detail concerning its procedures for processing CLEC orders for unbundled loops for advanced services, nor has it developed a standard ordering process for UNEs in general. In the face of this overwhelming record evidence of ongoing non-compliance on the part of SBC with its statutory obligations, the Commission can attach no weight to SBC's request that the Commission accept on faith its future commitment to provide nondiscriminatory access to ADSL-capable loops and collocation of ADSL equipment.

Finally, the Comments of the CLECs in particular make clear that there remains a critical public interest for SBC to remain subject to the market-opening provisions of Section 252(i).<sup>11</sup> Section 252(i), the so-called "pick and choose" provision, is an important statutory tool to permit market entry. Unless carriers have the ability to "opt in" to another parties' interconnection agreement, they will be forced to negotiate and arbitrate an agreement in every state and with every carrier for every additional advanced service that they wish to offer. Such a state of affairs will certainly protect

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<sup>10</sup> Id. at 4-5; see also ICG Telecom Group, Inc. ("ICG") at 10-20. The fact that SBC cannot find even 100 square feet of space when its competitors come calling, but can find ample space for its own new technologies, is yet another example of the reasons why the Commission cannot take seriously SBC's claim that the Commission can accept its "assurances" of fair treatment of its competitors.

<sup>11</sup> See CompTel at 9-10; DSL Access Telecommunications Alliance ("DATA") at 14-16.



the ILEC's market -- each new entrant will face a delay of at least nine months, and tens if not hundreds of thousands of dollars in litigation expenses -- for every state in which it wishes to operate.<sup>12</sup> Such a policy would certainly have private benefit to SBC as an unfair market barrier, but it can have no public benefit to consumers or new entrants.

**III. THE COMMENTS FURTHER DEMONSTRATE THAT SBC'S THREE PRONG "QUALIFICATION" TEST WOULD MERELY CREATE YET ANOTHER BARRIER TO COMPETITION**

AT&T/TCG demonstrated in their Comments that the so-called "commitments" of SBC to provide ADSL service to its competitors are not only inadequate to meet CLECs' legitimate needs, but would be used affirmatively to impede CLECs' access to these critical network elements and services.<sup>13</sup> This concern is echoed in the Comments of the CLEC commenters, many of which evidence great concern with the anti-competitive potential in SBC's three "checks" -- facilities availability, loop qualifications, and spectrum management -- to determine whether a loop is ADSL-capable.<sup>14</sup> For example, the DSL Access Telecommunications Alliance ("DATA") says that the "broad three pronged checklist outlined by SBC would enable it to restrict the

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<sup>12</sup> See DATA at 14.

<sup>13</sup> AT&T/TCG Comments at 6-11.

<sup>14</sup> CompTel at 4-6; Covad at 7-8; DATA at 5-11; Hyperion at 2, 6-8; ICG at 24.

deployment by competing providers of DSL technologies.”<sup>15</sup> CompTel explains that SBC’s three-prong loop qualification process provides “opportunities for abuse.”<sup>16</sup>

SBC’s proposed “nondiscriminatory” access process would fail to satisfy the true meaning of that requirement. SBC’s empty commitment to provide CLECs with nondiscriminatory access to ADSL-capable loops has been characterized as “rife with the ability to cry interference and force customers to take voice and data services from SBC.”<sup>17</sup> As CIX observes, carriers likely would not receive “equivalent access,” because SBC would require customers of other data services providers to purchase a second line, while no second line would be necessary for the SBC service, thereby raising the costs to consumers for competitors’ service.<sup>18</sup>

DATA points out that the first prong of SBC’s test -- the “facilities qualification test” -- would allow SBC to deny use of a copper facility based on SBC’s conclusion that the conditions of the loop preclude its use for xDSL applications, even if the competitor planned to use technologies and equipment that could operate successfully under such

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<sup>15</sup> DATA at 6.

<sup>16</sup> CompTel at 4-5 (comparing the spectrum management check to the prior Bell System claims that new CPE would harm the network); Covad at 8 (“SBC should be forced to tell the world the basis under which it is planning to withhold loops from CLECs that wish to provide DSL services.”).

<sup>17</sup> Allegiance at 5; see also DATA at 7-11.

<sup>18</sup> CIX at 4.

circumstances.<sup>19</sup> Moreover, SBC's test appears to proceed from the assumption that if certain impediments are located on a line that a competitor seeks, the line is to be automatically disqualified, without notification or consultation with the customer. There does not appear to be an assumption that lines will be rectified to be usable for xDSL applications, even though for its own purposes SBC may be able to correct defects to make a line usable.

CLEC Commenters are particularly concerned with the potential for discrimination posed by SBC's spectrum management plan. SBC proposes to identify whether "disturbers" disqualify a loop from ADSL capability, but as DATA explains, SBC's own ADSL technology, provided by Alcatel, is itself the "chief 'disturber.'"<sup>20</sup>

The Alcatel technology tends to cause significantly greater spectrum interference than alternative DSL technologies being used by SBC's competitors. The unique characteristics of the Alcatel technology tends to "disturb" other DSL lines, while the DSL technology most commonly deployed by SBC's competitors does not cause *any* disturbance. Thus, the Alcatel technology being deployed by SBC is by no means the only, or even preferable, ADSL technology. Accordingly, by enshrining, through unilateral action, the Alcatel spectrum characteristics into an "availability check," SBC's spectrum guidelines are by no means technologically neutral.<sup>21</sup>

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<sup>19</sup> DATA at 7-8.

<sup>20</sup> Id. at 9.

<sup>21</sup> Id. at 9-10 (emphasis added).

As Hyperion notes, the spectrum management check "is nothing more than a subjective test that will enable the SBC LECs to deny a competitor's loop request because it will interfere with the SBC LECs' *own services*."<sup>22</sup> Accordingly, the record developed in this proceeding demonstrates that SBC's so-called "commitment" to apply a three-part qualification process in a fair and competitively neutral fashion cannot be accepted.

#### **IV. THE COMMENTS CONFIRM THAT THE COMMISSION MUST DENY SBC'S REQUEST FOR NON-DOMINANT TREATMENT UNDER SECTION 10**

The Comments make clear that SBC has not satisfied any of the three criteria for relief from dominant tariff filing requirements and dominant pricing constraints under Section 10(a) of the Communications Act.<sup>23</sup> In particular the Comments confirm that SBC has not made its case that there is substantial competition for the provisioning of ADSL service to justify forbearance from dominant regulation. In

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<sup>22</sup> Hyperion at 7 (emphasis in original).

<sup>23</sup> Section 10(a) of the Act provides that the Commission shall forbear from application of any provision of the Act "if the Commission determines that -

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest."

contrast to SBC's competitive picture, the comments show instead that SBC retains monopoly control over the ADSL loops and associated electronics, as well as access to its central office space, and thus maintains monopoly control over the essential facilities required to provide a competitive service.

The Comments confirm that SBC's anecdotal description of limited offerings of allegedly comparable alternatives<sup>24</sup> falls far short of proving, with substantial record evidence, that there is substantial competition in the local data communications services market which could warrant forbearance of SBC's ADSL services. As CIX and other parties point out, high-speed data services through cable modems and via satellite, proffered by SBC as viable xDSL competitors, simply have not been developed and are not available to any degree that permits these alternatives to serve as competitive alternatives to ADSL today.<sup>25</sup>

Moreover, SBC's discussion of alternative service providers notably "fail[s] to mention, however, that each of these companies is a very new entrant with no

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<sup>24</sup> SBC Petition at 11-17.

<sup>25</sup> See CIX at 15. AT&T's proposed acquisition of TCI is certainly expected to lead to improvements in the availability of such services. However, the fact of the matter is that as of today, this acquisition is merely proposed and approval is many months away, TCI's network passes only one third of the nation's households, and even once the transaction has been closed, considerable time, investment, and effort will be required before AT&T/TCI could offer high speed data services to that segment of the marketplace. Thus even if AT&T and TCI are able to provision every single household currently on TCI's network, the majority of American homes will still be accessible to CLECs only through ILEC facilities.

significant market penetration, and who is wholly dependent on the facilities which are completely dominated by the SBC LECs.”<sup>26</sup> Indeed, BellSouth can only muster in support of competitive services offered by cable modems and other “potential alternatives” that they are “emerging in a developing market.”<sup>27</sup> This is hardly a ringing endorsement of full-blown competition from alternative technologies.

SBC relies heavily on the potential availability of collocation and unbundled ILEC loops to offer xDSL competition.<sup>28</sup> The fact remains, however, that reliance on such alternatives to prove the existence of competition is plainly insufficient. First, CLECs currently are not capable of providing truly competitive ADSL service offerings using ILEC loops given that ILECs do not provide nondiscriminatory access to the required facilities. Covad and ICG recount a number of issues and experiences that clearly show that the ILECs have failed to provide unbundled loops in a commercially reasonable manner.<sup>29</sup>

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<sup>26</sup> Hyperion at 5; see also CIX at 15 (stating that “these independent providers are themselves dependent on SBC’s local telephony network”); DATA at 6 (stating that the petition “fails to acknowledge . . . that [competitors’] ability to compete is wholly contingent on SBC’s nondiscriminatory provision of loop and collocation facilities”); Hyperion at 5 (describing cable modem services as “new and unproven” and “still not available on a widespread basis”); KMC Telecom Inc. at 2-3; and McCollough and Associates, P.C. at 4-6.

<sup>27</sup> BellSouth at 2.

<sup>28</sup> SBC Petition at 17-21; see also BellSouth at 5-6.

<sup>29</sup> Covad at 4-8; ICG at 10-20; see also Intermedia at 7-8; MCI at 9-10; Worldcom at 8-9.

Second, these ILEC parties ignore the fact that, due to ILEC engineering choices, unbundled loops are simply not a competitive alternative for many situations in which the ILEC can provide ADSL or other xDSL services. LCI's appendix provides a good summary of the current provisioning practices in offering ADSL service in ILEC networks today.<sup>30</sup> The diagram shown at Appendix C to LCI's Attachment B demonstrates that ILECs can provision ADSL services using Digital Loop Carrier ("DLC") facilities, where the copper loops terminate not at the central office, but at a remote facility in the field. In such circumstances, it is unlikely that a competitor could even offer xDSL services to those end users, since there would not be a continuous copper loop -- what LCI refers to as a "home run" loop -- from the end user to the central office, where the competitor could establish a collocation facility to connect to copper loops.

Because the ILECs are provisioning a large and increasing number of subscriber loops using DLC architectures,<sup>31</sup> the alternative offered to the CLECs of using "home run" copper loops from the end user to a central office collocation is simply not available for those customers. By methodically re-engineering their local networks to place the electronics out of reach of CLECs, the ILECs are systematically "walling off" their

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<sup>30</sup> LCI, Attachment B, "CLEC Access to xDSL Technology: A Necessary Predicate for Widespread, Competitive Deployment of Broadband Telecommunications Services."

<sup>31</sup> LCI, Attachment B at 27 (estimating that approximately 20-30 percent of all subscriber lines are currently served by ILECs using DLCs).

networks to competitors. It is thus increasingly apparent, and increasingly imperative, that the Commission not only deny the requests of ILECs such as SBC and the other RBOC competitors, but must also clearly define, as a UNE, ADSL loops equipped with the electronics to provide ADSL service.<sup>32</sup> Section 251(c) provides for entry into the local exchange market through collocation and the lease of the ILEC's network elements, both in whole or in part. However, a new market entrant would face an economic burden if only these paths were available. The scale and scope of the ILECs cannot be matched by emerging competitors.<sup>33</sup> Therefore the availability of unbundled DSL-equipped loops and the resale of an ILEC's retail ADSL service at a wholesale rate are a key part of the competitive entry alternatives specifically required by the Telecom Act, and are necessary for the promise of competition to develop in these emerging markets.

The Comments demonstrate, therefore, that allowing SBC to provide ADSL over its local loops without adherence to Section 251(c) obligations "will likely eliminate any possibility of true competition for [ADSL] services."<sup>34</sup> The comments also demonstrate

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<sup>32</sup> See Comments of AT&T at 7-8, Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-78.

<sup>33</sup> CompTel at 6.

<sup>34</sup> Allegiance at 5.



that SBC's assertion of a competitive ADSL market is devoid of any factual support.

Consequently, dominant carrier regulation of SBC's provisioning of ADSL infrastructure and services continues to be necessary to ensure just and reasonable charges and practices, to protect consumers, and to preserve the public interest.

**V. CONCLUSION**

For the reasons stated above and in the AT&T and TCG Joint Comments, the Commission must deny SBC's petition in its entirety.

Respectfully submitted,

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Dated: July 1, 1998

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I, Dottie E. Holman, do hereby certify that copies of the foregoing Joint Reply Comments of AT&T Corp. and Teleport Communications Group Inc. were served by hand-delivery and first-class mail, as indicated, this 1<sup>st</sup> day of July, 1998, to the following:

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